REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 11114/2015

1/2/2017

Reportable: No

Of interest to other judges: No

Revised.

In the matter between:

MOLEINE VAN STADEN N.O **Applicant**

(ID NO: …)

and

HELEN PETRONELLA JOHANNA NEL N.O **1st Respondent**

(ID NO: …)

JOHANNES LODEWYK BOUWER N.O (ID NO: …) **2nd Respondent**

In their capacities as Trustees of the MC Botha trust

Registration no. IT 11030/06

JUDGMENT

AC BASSON. J

The parties

[1] This is an application for the sequestration of the MC Botha Trust ("the trust"). The applicant - Mrs Moleine van Staden ("Van Staden") - is the duly appointed executrix in the estate of the late Mrs MC Botha ("the deceased"). The deceased was the mother of Van Staden. Van Staden launched this application for the sequestration of the trust in her capacity as the appointed executrix in the estate of the deceased on the basis that the trust committed an act of insolvency as envisaged by sections B(c) and B(d) of the Insolvency Act[1] and/or on the basis that the trust is factually insolvent.

[2] The trust is represented by the first and second respondents in their capacities as trustees of the trust. The first respondent is Mrs Helen Nel ("Nel"). Van Staden and Nel are siblings and both are daughters of the deceased.

[3] The second respondent is Mr Johannes Bouwer ("Bouwer") of ACT Solutions Pretoria Incorporated ("ACT Solutions"). Bouwer is an accountant and was appointed by Nel as a co-trustee of the trust. He was also appointed by Nel as the accounting officer of the trust.

[4] Van Staden disputes the *locus standi* of Bouwer and more in particularly questions the manner in which he was appointed as the accountant responsible for the trust as well as his appointment as a trustee of the trust. Van Staden alleges that the appointment of Bouwer as a trustee was "orchestrated" following the alleged inappropriate removal of Venter de Jager as the (previously) appointed chartered accountants of the trust. (I will return to these allegations in more detail herein below.) Nel in turn disputes the *locus standi* of Van Staden to bring this application in her capacity as executrix of the estate.

<u>The trust</u>

[5] The trust was formed in 2006 by the deceased with the express purpose of providing for her personal maintenance and medical care during her lifetime. The purpose of the trust was confirmed by Mr Boshoff - a chartered accounted. Boshoff was the previous accounting officer of the trust and also attended to the drafting of the trust deed on the instructions of the deceased. He confirmed that the understanding was that the

[1] Act 24 of 1936.

deceased would make loans and/or donations to the trust for the purpose of funding the trust. Boshoff can, however, not confirm whether the payments that were made by the deceased during her lifetime to the trust were to be regarded as loans or whether they were donations.

[6] In July 2007 the deceased made a once-off payment in the amount of R 500 000.00 (five hundred thousand rand) to the trust. This amount was paid over to the trust from the deceased's personal funds. As already pointed out, the (undisputed) understanding was that the amount will be utilized for the on-going maintenance and medical expenses of the deceased.

[7] It was not disputed that when the deceased paid over the said amount to the trust, she was aware of the fact that this amount would reduce over time. The deceased was also aware of the fact that the trust had no other income other than the amount paid over by her to the trust.

[8] The deceased passed away on 2 July 2008 and up and until her death she was the sole income and capital beneficiary of the trust. After her death a letter was addressed to the various beneficiaries of the trust informing them that an amount of R 241 127.00 was available. The monies that therefore remained in the trust constitute the difference between the R 500 000.00 (that was paid over to the trust by the deceased) and the costs of administration of the trust together with the payments paid out during the lifetime of the deceased in respect of her personal maintenance and medical care.

[9] The debt on which Van Staden (in her capacity as the duly appointed executrix in the deceased estate of the late MC Botha) relies to establish her *locus standi* to bring the application for the sequestration of the trust, pertains to the R 500 000.00 which was, according to Van Staden, a loan to the trust and therefore repayable to the estate of the deceased.

[10] On 11 October 2011, ACT Solutions, acting as the accounting officers of the trust, circulated the financial statements for the years ending February 2008 - 2011 and the financial statements for the six months to the end of August 2011 to all the beneficiaries of the trust. ACT Solutions also requested the beneficiaries to sign the document to

indicate that they are - *"tevrede is met die bestuur en finansies van die MC Botha Trust, en dat daar geen eise, nou en toekomstiglik, teen die MC Botha Trust en/of die trustees, gesamentlik en/of afsonderlik, ingestel sat word nie".* Van Staden and the other beneficiaries refused to sign the document.

<u>Acrimonious relationship</u>

[11] Before I turn to a summary of the facts that are directly relevant to the question before this court, I must point out that it is patently clear from the papers that this case exhibits all the characteristics of an acrimonious family feud over who is entitled to the proceeds from the deceased's estate and her trust. The papers are replete with accusations of maladministration of the trust and underhandedness regarding the appointment of Bruwer as a trustee and accounting officer of the trust. The parties also seem to be in dispute about whether the deceased was in fact able to manage her own affairs prior to her death and even seem to disagree on the health status of the deceased prior to her death, despite numerous medical reports that detail and confirm the diminished mental and physical health of the deceased prior to her death. Van Staden even states in her affidavit that the deceased had changed her will to exclude Nel as a beneficiary in light of her (Nel's) "greedy conduct".

[12] Although Van Staden tries to tone down the extent of the strained relationship between her and Nel, it is clear from the papers that the relationship is more than strained. In this regard Nel, unequivocally confirms in her affidavit that the present application is "the present incarnation of a long-standing and bitterly unfortunate family feud".

[13] As already pointed out, the papers are replete with serious allegations of maladministration of the trust and these allegations are squarely levelled against Nel. Van Staden accuses Nel of using trust monies for her own personal benefit and more in particularly that Nel had used trust funds to settle the bills of her own attorneys (Weavind & Weavind Incorporated) as the trust was not engaged in any legal proceedings. Van Staden even goes so far as to suggest that soon there will be no funds left in the trust due to the maladministration of the trust and the conduct of the two respondents.

[14] Van Staden also accuses Nel of fraudulently removing the deceased as a trustee and that she did so, on the basis that the deceased was mentally unfit to handle her own affairs. According to Van Staden all of this was done in an attempt "to appoint a new trustee and [to] get rid of the auditors in order to plunder the trust funds". Van Staden maintains that the deceased was in fact capable of being a trustee "but [that she] was swindled out of her role" by Nel. In short, according to Van Staden the two respondents had effectively "hijacked" the trust.

[15] Nel strenuously denies all these allegations and in turn accused Van Staden of making defamatory statements against her and her husband regarding the administration of the trust. According to Nel these accusation are without foundation and devoid of any truth. Nel also contended that this application is a flagrant abuse of court process and devoid of any merit.

[16] In respect of the allegations regarding the physical and mental condition of the deceased, Nel explained that in November 2005 the deceased had suffered a minor stroke. After her stroke the deceased moved in with her (Nel) and her family. Nel explained that the deceased needed the assistance of stay-in nurses particularly after the deceased was diagnosed with Parkinson's disease which contributed to the deterioration of the deceased's already diminished physical and mental abilities. In this regard Nel referred to numerous written medical reports submitted by Dr De Koning and other medical doctors who attended to the medical condition of the deceased prior to her death. Reference is also made to the Iago-psychiatric report prepared by Dr De Wet who evaluated the deceased prior to her death. Detailed reference is also made to the two medical opinions of Dr Guldenpfennig and Dr Colin in which both doctors confirmed the diminished mental capacity of the deceased. Dr De Wet concluded that the deceased suffered from an advanced stage of dementia, secondary to multiple causes, *inter alia,* hypertension, heart failure and Parkinson's disease. According to Nel, the deceased became increasingly incapable of communication and was completely incapable of managing her own affairs, including the affairs of the trust.

[17] Regarding the allegations that Nel removed the deceased as a trustee in an underhandedly manner, Nel explained that the deceased lacked the mental capacity to

act as a trustee and that she did what was expected of her and that she did so on the advice of an attorney and counsel.

[18] Nel also referred to a meeting that was held at the offices of Boshoff (who was at the time the appointed accounting officer of the trust). When Nel arrived for the meeting (which was also attended by one of her siblings - Mr Herman Botha) she realised that the purpose of the meeting was to remove her as a trustee and to appoint the following people as trustees of the trust: the deceased (MC Botha). Van Staden (the applicant}, Botha (one of the siblings) and Boshoff (the chartered accountant).

[19] According to Nel the trust deed did not provide for authority or any mechanism by which such a decision could have been taken and accordingly she submitted that the decision was unlawful. After this meeting and as a result of the conduct of Boshoff, Nel reported him to the Independent Regulatory Board for Auditors. Weavind & Weavind attorneys were thereafter appointed to provide an opinion on the future administration of the trust.

[20] Because the deceased did not have the mental capacity at the time to take any decisions regarding the trust, Nel approached ACT Solutions with the aim of appointing Bouwer as a co-trustee. On 29 May 2009 Bouwer was appointed by the Master as a co-trustee of the trust. Bouwer was also appointed as the accounting officer of the trust because Nel could not see her way open to have Boshoff remain as the accounting officer of the trust in view of the breakdown in the relationship.

[21] Nel confirmed that the trust has delivered all bank accounts and all supporting documents in respect of all payments made from the bank account of the trust to the attorneys of record acting on behalf of the beneficiaries. The attorneys were requested to direct all inquiries and/or objections to any of the documents and transactions in writing to the trustees in order to enable them to respond thereto in writing to avoid any confusion and in order to keep proper record of all correspondence. According to Nel, despite having been afforded more than ample opportunity to raise any concerns or object to the expenses incurred by the trustees on behalf of the deceased, none have been received and instead Van Standen "maliciously" elected to institute this application some four years later. Nel also referred to a resolution taken by the trustees dated 25

June 2014 which recorded that the trustees as at that date had not received any feedback from Van Staden or the other beneficiaries regarding any payments made by the trust.

[22] According to Nel the trust has served its purpose and there accordingly exist no reason for its continuance. In this regard Van Staden and the other beneficiaries were informed that the continuous payment of administrative fees was systematically decreasing the capital amount.

Question before the court

[23] It is not before this court whether the trustees of the trust are in fact guilty of maladministration of the trust. It is also not for this court to make a finding on the mental capabilities of the deceased although there are strong indications having regard to the numerous and detailed medical reports attached to the papers, that the deceased was indeed mentally and physically impaired for some time prior to her death.

[24] The only and very limited question before the court is whether the deceased had "donated" an amount of R 500 000.00 to the trust and/or whether it was merely a "loan" entitling Van Staden in her capacity as executrix to demand repayment of the loan (less legitimate expenses paid out towards the maintenance and care of the deceased). If it is concluded that the estate is entitled to claim repayment of a loan, it then falls to be decided whether the trust is able to repay the loan and if not whether the trust is insolvent. Also before the court is the question whether the trust has committed any one or more of the various acts which the Insolvency Act has constituted as acts of insolvency.

[25] In order to succeed in obtaining an order for the sequestration of the trust, Van Staden therefore has to show that the trust is indebted to the deceased's estate in a liquidated amount that is actually due and payable. In addition, it must be shown that the trust has committed any one or more act of insolvency as provided for in section 8 of the Insolvency Act[2] or that the trust is in fact insolvent.

[2] Act 24 of 1936.

[26] It is, on a plain reading of the papers, unclear what amount is being claimed by Van Staden on behalf of the estate: In the founding affidavit Van Staden claims that the trust owes the estate R 500 000.00 and because only R 242 027,42 is available, the trust is factually and commercially insolvent. On the other hand, Van Staden also claims in the founding affidavit that the deceased's loan account payable to the estate is an amount between R 427 758.00 and R 381 807.00.

[27] As already pointed out, Van Staden does not dispute that the amount of R 500 000.00 was paid over to the trust and that the monies so paid over was to be used towards the personal maintenance and medical expenses of the deceased. Van Staden also does not seem to dispute that certain payments have in fact been made towards the personal maintenance and medical care of the deceased and that those amounts had to be deducted from the R 500 000.00 that was initially paid over to the trust for this very purpose.

Loan or a donation

[28] The only ground for factual insolvency of the estate is dependent on the existence of a loan made by the deceased to the trust. If the court concludes that the money paid over to the trust was in fact a loan (as opposed to a donation), it will follow that the loan constitutes an asset in the estate of the deceased. Only then will the question arises whether the trust is factually insolvent.

[29] In support of Van Staden's allegation that it was a "loan" and not a "donation", reference was made to the fact that the initial financial statements prepared by the trust indicated that the loan was repayable within two years. In later financial statements it is recorded that the loan is only repayable when the trustees so decide. According to Van Staden the financial statements are at odds with what is now contended namely that the R 500 000.00 was a "donatoin" as opposed to a "loan". In this regard reference was made to the decision in *De Jager v Grunder*[3] where it was held that there is a presumption against donations in our law. Van Staden further contended that the amount claimed is liquidated in the financial statements and even if it was not, such amount can easily be calculated by deducting the expenses from the initial loan

[3] 1964 (1) SA 446 (A) at 463.

amount. According to Van Staden the trust is clearly factually insolent with its liabilities far outweighing its assets.

[30] Nel, on the other hand, disputed Van Staden's claim and submitted that no such loan existed and that the R 500 000.00 clearly was intended to be a "donation" to the trust and that it could never have been the intention of the deceased that the amount of R 500 000.00 was merely a loan from her to the trust for the following reasons: Firstly, the deceased caused the amount to be paid to the trust knowing fully well that the moneys were to be utilised for her maintenance and medical care and that the amount would therefore reduce over time. The deceased therefore knew that by the time of her death, the amount would be less than R 500 000.00. Secondly, the deceased knew full well that the trust did not have any other income and that the trust would therefore never be able to repay a loan upon her death. Thirdly, the deceased expressly made provision in the trust deed that, in the event of her death, her children would be the beneficiaries of her trust.

[31] Unfortunately the deceased - at the time she paid over the R 500 000.00 - did not convey to anyone whether the moneys paid over to the trust would either constitute a loan or a donation. Not even Boshoff, who attended to the drafting of the trust deed and who was the accounting officer of the trust, was told whether the moneys so paid over constituted a loan or a donation. Nel likewise confirms in her affidavit that the deceased also never conveyed to her whether the moneys paid over would either constitute a loan or a donation. This question therefore has to be answered in light of the facts that were placed before the court.

[32] I have considered the papers and I am in agreement with the submission made on behalf of Nel that the R 500 000.00 paid over to the trust could not have been a loan and that it therefore could not have been the intention of the deceased that whatever was paid over by her to the trust (minus expenses) had to be re-paid by her trust to her estate upon her death. In this regard I have already referred to the fact that it was common cause that the amount that was paid over to the trust was to benefit the deceased during her lifetime and that she therefore must have known that the amount would diminish over time. Regard must also be had to the fact that the trust deed provides that the deceased's children would be the beneficiaries of the trust after her

death. If it was the intention of the deceased that the R 500 000.00 was a loan that had to be repaid to her estate why then was provision made that her children would be the beneficiaries of the trust? Beneficiaries of what? The trust had no other income except for what was paid over to the trust by the deceased. Lastly, I have already referred to the common cause fact that the R 500 000.00 was paid over to the trust with the sole purpose of paying for the maintenance and medical expenses of the deceased during her lifetime. If this was the purpose of the payment, the question arises why would the deceased loan this amount to the trust and not merely pay for her maintenance and medical expenses from her own personal bank account?

[33] I am therefore in agreement with the submission that the only reasonable inference that could be made from these facts is that the deceased had paid over this amount to her trust for the sole purpose of providing her with care and that upon her death - whatever amount remained in her trust - had to be paid over to her beneficiaries. The payment of the amount of R 500 000.00 (less expenses) could not therefore have constituted a loan from her estate to the trust. See in general: *Avis v Verseput*[4] where the court held as follows:

> "In my opinion the question whether a donation promised verbally arose from sheer liberality or not is one of, fact which can be proved by a balance of probabilities of course the Court cannot profess to be able to divine what was in the donor's mind. But the proved facts may in a particular case be strong enough to justify an inference 'as to the donor's' real motive. I use the word motive in its ordinary sense – that which moves or induces a person to act in a certain way, a reason which influences a person's volition; see Shorter Oxford Dictionary. In my opinion the Roman-Dutch authorities, in saying that a genuine donation is one made out of pure liberality, mean a donation in which the donor's motive (using the word in the above sense) is liberality, that liberality is the reason which influences him to make the gift. The language used supports this view, for instance, *ac propter nullam aliam causam facit quam ut liberalitatem et munificentiam exerceat* (Voet, following the Digest, *quod quis ex mera liberalitate, nu/lo jure cogente, in alium confert* (van Leeuwen, Cenf. For.),

[4] 1943 AD 331 at 366.

simplex quae sit ex absoluta liberalitate (Huber, Praelect. ad Inst., 2.6.4), *uit loutere liberaelheyt ende goedwilligheyt nevens den donataris* (Huber, Hed. Rechts.)."

[34] In light of the aforegoing I am therefore of the view that the balance of the amount of R 500 000.00 does not constitute a loan by the deceased's estate to the trust. Consequently the trust does not have a single creditor. It therefore follows that the application for the sequestration of the trust should be dismissed with costs.

Costs

[35] In respect of costs it was submitted that the court should grant costs on a punitive scale and that because the proceedings constitute a flagrant abuse of court process, Van Staden should pay the costs in her personal capacity. I agree. If regard is had to the papers and the serious allegations that were levelled against Nel, there is, in my view, sufficient justification for an order on a punitive scale. Iam further persuaded that Van Staden should pay the costs in her personal capacity and that the estate of the deceased should not pay for an application that clearly constitutes an abuse of court process.

Order

[36] In the event the following order is made:

1. The application for the sequestration of the MC Botha Trust (IT 11030/06) is dismissed.
2. The application, Mrs Moleine van Staden N.O is directed to pay the costs of this application in her personal capacity on the scale as between attorney and client.

AC BASSON

JUDGE OF THE HIGH COURT

Appearances:

On behalf of the applicant

Adv JGC Hamman

Instructed by: Romanos Attorneys

<u>On behalf of the respondents</u>

Adv PG Cillliers SC

Instructed by: Weavind & Weavind